BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERARDO OLIVARES	)	
Claimant	)	
	)	
VS.	)	
	)	
MID-CONTINENT SPECIALISTS, INC.	)	
Self-Insured Respondent	)	Docket No. 237,793
	)	
AND/OR	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed Administrative Law Judge Robert H. Foerschler's Award dated October 29, 2001. The Board heard oral argument on April 16, 2002.

APPEARANCES

Claimant appeared by his attorney, C. Albert Herdoiza of Kansas City, Kansas. The self-insured respondent appeared by its attorney, Mark S. Gunnison of Overland Park, Kansas. The Workers Compensation Fund appeared by its attorney, Michael R. Wallace of Shawnee Mission, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined the parties were not covered by the Workers Compensation Act (Act) and denied claimant an award of benefits. The ALJ concluded that it appeared claimant was engaged in a joint venture with his brother and their business did not have a sufficient payroll to be covered by the Act. Although the ALJ further concluded claimant was a statutory employee of respondent Mid-Continent Specialties, Inc., he apparently determined that entity also did not have a sufficient payroll to be covered by the Act.

Claimant argues his immediate employer was his brother Genaro Morales and that his brother paid a third employee more than $20,000 in 1998. Consequently, claimant argues that his brother was subject to the Act. Because his brother was uninsured and insolvent, the claimant concludes the Workers Compensation Fund (Fund) is liable. In the alternative, claimant argues Mid-Continent had a payroll more than $20,000 in 1998 when its leased employee payroll is considered. Claimant notes Mr. Morales contracted with Mid-Continent to perform roofing which was an integral part of Mid-Continent's business. Accordingly, claimant argues he was a statutory employee of Mid-Continent.

Mid-Continent and the Fund argue claimant failed to meet his burden of proof to establish a sufficient payroll to bring the parties within the coverage of the Act. It is also argued that claimant was engaged in a joint venture with his brother which prevents him from being considered an employee. It is further argued that because Mid-Continent did not have a payroll it is not subject to the provisions of the Act. Lastly, Mid-Continent argues that claimant was neither its employee nor statutory employee.

The parties never stipulated to any of the issues raised by this workers compensation claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was injured on July 7, 1998, while working for his brother putting a roof on a house. Claimant slipped and fell approximately 30 feet from the roof to the ground injuring his right leg and hip.

Claimant testified he was employed as a roofer by his brother, Genaro Morales. Mr. Morales also said claimant was his employee. Mr. Morales stated that at the time of the claimant's accident they were working for Tony Evans, Mid-Continent's manager.

Mid-Continent sells roofing material and installs roofs, siding and gutters. Mid-Continent supplies materials to the work site and has the work performed by its leased employees or subcontracts with vendors for performance of the job. Mid-Continent has leased employees who perform the work but it also keeps a list of jobs available which a subcontractor can agree to perform. If a subcontractor agrees to perform a job it is done on the basis of an oral agreement regarding the lump sum, based on the square footage of the project, and then upon completion of the project the subcontractor is paid by Mid-Continent.

It is undisputed that at the time of the injury the roofing job had been obtained by Morales from a list of available jobs Mid-Continent posted at its office.

Whether the parties are subject to the act

Mid-Continent argues that it did not have a sufficient payroll to be covered by the Act because it had no payroll. The Act provides:

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to: . . . (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;[1]

When a worker is seeking benefits from a principal or "statutory employer," the issue is not whether the immediate employer's payroll meets the threshold amount required by the Act. Instead, the issue is whether the principal's payroll meets the threshold amount. To do otherwise would allow principals to avoid the Act by contracting with small subcontractors having annual payrolls less than $20,000.

Mid-Continent leased employees from Midwest Staffing Solutions, Inc. Midwest Staffing Solutions, Inc. provided the leased employees payroll, administrative services, benefits, health insurance, 401K plan and workers' compensation insurance.

Mid-Continent argues it does not have a sufficient payroll because it only has leased employees and consequently has no payroll. But it was agreed that Mid-Continent paid Midwest Staff Solutions, Inc., for all the employees that were provided and that the payroll for the leased employees annually exceeds $20,000.[2]

The phrase "all employees" in K.S.A. 44-505 must be construed to include leased employees otherwise a contractor could avoid liability to statutory employees by leasing employees and arguing, as Mid-Continent does in this case, that it is not subject to the Act because it does not have a sufficient payroll. Such an arrangement would subvert the provisions of K.S.A. 44-503 which is to "prevent employers from evading liability under the

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[1] K.S.A. 1998 Supp. 44-505.

[2] Smith Depo., at 30-31.

act by the device of contracting with outsiders to do work which they have undertaken to do as a part of their trade or business."[3]

Mid-Continent had an annual payroll for its leased employees in excess of $20,000 and is subject to the provisions of the Act.

Employee and employer relationship

Claimant and his brother both agreed that claimant worked as a roofer for his brother. Although there is mention that claimant would sometimes pick up jobs at Mid-Continent, claimant said he did so because he spoke English better than his brother. Claimant's brother denied that he and claimant had a partnership to perform roofing work. The uncontradicted testimony from both claimant and his brother establishes that on the date of the accident claimant's immediate employer was his brother Genaro Morales.

On the date of the accident claimant was performing work on a job that Mr. Morales had subcontracted from Mid-Continent Specialties, Inc. On the date of accident Mr. Morales did not have workers compensation insurance coverage and was financially unable to pay claimant any workers compensation benefits.

K.S.A. 1998 Supp. 44-503(a) extends the application of the Workmen's Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.[4] As previously noted, the purpose of the statute is to give employees of a sub-contractor a remedy against a principal contractor and to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken as a part of their trade or business.[5] The statute provides:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; [6]

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[3] *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992).

[4] *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 402, 729 P.2d 1214 (1986).

[5] *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966).

[6] K.S.A. 1998 Supp. 44-503(a).

> . . . **In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation**.[7] (Emphasis added)

There is a two-part test to determine whether the work which caused the injury is part of the principal's trade or business, *i.e.* (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the injured employee such as is ordinarily done by employees of the principal? If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's trade or business, and the injured employee is a statutory employee of the principal.[8]

Mid-Continent sells roofing material and installs roofs, siding and gutters. Mid-Continent supplies materials to the work site and has the work performed by its leased employees or subcontracts with vendors for performance of the job. The installation of roofing is an integral part of Mid-Continent's work. Because it subcontracted with Mr. Morales to perform the roofing work that would make claimant, an employee of Mr. Morales, a statutory employee of Mid-Continent.

Although Mid-Continent argues there is no evidence of a contract between it and the homebuilders, nonetheless, the evidence clearly leads to the inescapable conclusion that such contracts exist.[9] For example, the individual job billings specifically referred to Mr. Morales as a subcontractor. And it was noted the builders would contact Mid-Continent when a house was ready for the roofing work. Mid-Continent would either send its leased employees to perform the work or would subcontract. Upon completion of the work, Mid-Continent paid the subcontractor and billed the individual builder.[10]

The claimant has met his burden of proof that on the date of injury he was a statutory employee of Mid-Continent. Consequently, Mid-Continent is liable for the payment of compensation.

Notice and written claim

Claimant's immediate employer, Mr. Morales, was working with claimant and knew that claimant had fallen from the roof. He further testified that he drove claimant to the hospital that night. The immediate employer's actual knowledge of the accident renders

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[7] K.S.A. 1998 Supp. 44-503(g).

[8] *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

[9] Smith Depo., Ex. C and D.

[10] Ibid at 43-44.

giving notice unnecessary.[11] The parties agreed upon receipt of written claim on October 22, 1998, when the application for hearing was filed. Written claim must be served upon the employer within 200 days of the accident.[12] The accident occurred on July 7, 1998. Consequently timely written claim was made. The Board concludes claimant made timely notice, written claim and application for hearing.

Accidental injury arising out of and in the course of employment

The uncontradicted testimony establishes that on July 7, 1998, claimant suffered accidental injury arising out of and in the course of his employment. Although claimant had been receiving chiropractic care for his hip before the accident, nonetheless, Dr. Hood concluded the July 7, 1998, fall aggravated his condition and rendered claimant unable to continue performing work as a roofer. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[13] The Board concludes claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment.

Average weekly wage

Claimant testified that he made between $500 and $600 a week. His employer testified claimant made $600 a week. Claimant did not keep track of the hours he worked or the number of shingles he placed. And he had no agreement with his brother regarding how much he would be paid. Neither claimant nor Mr. Morales kept any records regarding payments. Neither had any tax documents to support their contentions regarding payroll or claimant's wages.

There was evidence provided regarding how much money Mid-Continent paid Mr. Morales in 1998.[14] The sum paid Mr. Morales was sufficient to support the contention of Mr. Morales regarding what he paid himself, claimant and a third employee.

Although the lack of documentation is troublesome, nonetheless, the claimant's uncontradicted testimony coupled with Mr. Morales' testimony and the corroborative testimony regarding the sums Mid-Continent paid Mr. Morales combine to support

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[11] K.S.A. 44-520 (1993 Furse).

[12] K.S.A. 44-520a (1993 Furse).

[13] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

[14] Smith Depo., Ex. A.

claimant's uncontradicted testimony that he earned at least $500 a week. Consequently, the Board finds claimant has met his burden of proof to establish his average weekly wage was $500.

Nature and extent of disability

Dr. Hood opined claimant suffered a 40 percent whole body functional impairment as a result of the traumatic arthritis claimant suffered in his right hip. Dr. Hood noted that a majority of claimant's pathology in his hip probably preexisted the fall at work. But the doctor was not questioned regarding the percentage of impairment, if any, that preexisted this accident. Dr. Hood's opinion that claimant has a 40 percent functional impairment is the sole evidence offered on this issue and is adopted by the Board.

Claimant testified that he was unable to return to roofing and Dr. Hood agreed that claimant would be unable to return to that occupation because of the injury to his right hip. Consequently, claimant argues that he is entitled to a work disability. But Dr. Hood just prohibited claimant from climbing ladders and expressed concern regarding claimant's ability to maintain his balance if he was up on a roof.

Work disability is defined in K.S.A. 1998 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

But that statute must be read in light of *Foulk*[15] and *Copeland*.[16] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e(a), a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

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[15] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[16] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[17]

Claimant presented no evidence that he currently has any permanent work restrictions other than Dr. Hood's testimony that he should not climb ladders. Although claimant stated that the only work he had ever performed was as a roofer, there is no task loss testimony breaking that occupation down into the individual tasks necessary to perform that occupation. At best, Dr. Hood's testimony that claimant should not return to a job as a roofer because he should not climb ladders might describe a job loss but it does not identify task loss unless climbing ladders comprises the only task to be a roofer. Absent a list of all the job tasks claimant performed during the 15 years before the injury, it cannot be determined whether claimant suffered any task loss. Consequently, claimant has failed to meet his burden of proof to establish he suffered any task loss as a result of his work-related injury.

Turning to the wage loss component of the work disability formula, claimant did not engage in a job search for approximately a year after the work-related incident. This would not be considered a good faith effort and would require a wage to be imputed. But claimant proffered no evidence regarding his ability to earn a wage. Consequently, claimant has failed to meet his burden of proof to establish he suffered any wage loss as a result of his work-related injury.

Lastly, it should be noted that claimant is an illegal alien and does not have a work permit to perform employment in the United States. Therefore, claimant cannot lawfully apply for employment and employers cannot lawfully employ the claimant. Although claimant, even as an illegal alien, is entitled to the benefits provided by the Act, the Board finds, in this case, claimant's entitlement to permanent partial disability benefits is limited to his permanent functional impairment and he is not entitled to the higher work disability benefits.[18]

Respondent and its insurance carrier are ordered to pay all reasonable and necessary medical expenses for the July 7, 1998, right hip and leg injury as authorized medical and claimant is further entitled to unauthorized medical up to the statutory maximum, upon presentation of an itemized statement verification.

Future medical may be requested upon proper application to the Workers Compensation Director.

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[17] *Copeland* at 320.

[18] K.S.A. 1998 Supp. 44-510e(a). *See Ortiz v. Nies Construction, Inc.*, No. 199,812, 1997 WL 557543 (Kan. WCAB Aug. 25, 1997); *Cordova v. Spice Merchant & Co.*, No. 192,123, 1997 WL 803454 (Kan. WCAB Dec. 22, 1997).

AWARD

WHEREFORE, the Award of Administrative Law Judge Robert H. Foerschler dated October 29, 2001, is reversed.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gerardo Olivares, and against the respondent, Mid-Continent Specialists, for an accidental injury which occurred July 7, 1998, and based upon an average weekly wage of $500. The claimant is entitled to 166 weeks permanent partial disability compensation at the rate of $333.35 per week or $55,336.10 for a 40 percent functional whole body disability for a total due, owing and ordered paid in one lump sum less amounts previously paid.

Claimant's contract of employment with her counsel is approved insofar it is not in contravention to K.S.A. 44-536.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical is awarded upon proper application to and approval by the Director of Workers Compensation.

The fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent.

Hostetler & Associates, Inc.	
Transcript of Preliminary Hearing	$ 118.35
Transcript of Regular Hearing	$ 228.35
Transcript of Preliminary Hearing	$ 111.60
Transcript of Preliminary Hearing	$ 274.20
Deposition of Lynne Smith	$ 467.60
Deposition of Genaro Morales	$ 200.55
Deposition of Roger W. Hood, M.D.	$ 294.70
Total	**$**1,695.35
Richard Kupper & Associates	
Deposition of Ellie Dungan	$159.40
Transcript of Preliminary Hearing	$325.70
Total	**$485.10**
Metropolitan Court Reporters	
Transcript of Proceedings	**$256.50**

IT IS SO ORDERED.

Dated this _____ day of March 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Mark S. Gunnison, Attorney for Respondent
Michael R. Wallace, Attorney for Fund
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation